Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 76-600

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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**GEORGE ROMAN DRESKE,**

*Petitioner,*

vs.

**JAMES D. HOLT,**

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# In the Supreme Court of the United States

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## NO.

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**GEORGE ROMAN DRESKE,**

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vs.

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*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

---

The petitioner George Roman Dreske respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 2, 1976.

## OPINIONS BELOW

The opinion of the court of appeals on petition for rehearing, dated August 2, 1976, is reported at 536 F. 2d 105. The earlier unpublished order of the court of appeals dismissing the appeal is reported at 530 F.2d 973. The opinion and order of the District Court for the Southern District of Florida, dated September 11, 1975, is unre-

ported. The opinions and orders of the court of appeals and the district court are reproduced in the Appendix. (App. 1-12)

## JURISDICTION

The order of the court of appeals dismissing the appeal was entered on April 13, 1976. A timely petition for rehearing was granted. Judgment on rehearing was entered on August 2, 1976, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. s. 1254(1).

## QUESTION PRESENTED

Whether the Fifth and Fourteenth Amendments to the Constitution of the United States protect non-violent conduct solely intended to resist the unlawful and unreasonable demands of a police officer?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

### AMENDMENT V

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



### AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### FLORIDA STATUTE

Section 843.02, Florida Statutes (1971).

> "Whoever shall obstruct or oppose any such officer, beverage enforcement agent, any member of the Florida parole and probation commission or any administrative aide or supervisor employed by said commission or any personnel or representative of the department of law enforcement or legally authorized person in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

## STATEMENT OF THE CASE

Petitioner and his wife were proceeding in an automobile in a *northerly* direction on the Sunshine State Parkway in Martin County, Florida, during the afternoon of February 13, 1973. A young trooper of the Florida Highway Patrol stopped the petitioner's vehicle for purposes of issuing a citation for unlawful speed. In the course of the trooper's issuance of this citation, petitioner identified himself and, in response to a routine request for production of petitioner's driver's license, he informed the trooper that he did in fact have a valid license; however, it had apparently become lost or misplaced.

The trooper informed petitioner that bail would have to be posted in connection with these charges and that a personal check could not be accepted by him. Thereafter, two additional Highway Patrol officers converged on petitioner's vehicle positioning their automobiles in such a fashion as to prevent any possibility of petitioner's vehicle being driven away by him. Petitioner's wife who was now in the driver's position, was ordered to drive said vehicle and accompany the arresting trooper. She advised the officers that she was nervous and she would not follow their instructions to traverse the median strip of the Parkway in order to follow them *southbound* to the Stuart exit. Petitioner had previously agreed to follow the trooper to the next *northbound* exit to surrender himself to the Ft. Pierce Sheriff's Office. At this point in time, both petitioner and his wife were inside their automobile with the doors locked.

All three officers held the same rank. Since they were uncertain as to how to proceed in these circumstances, a radio call was placed to a supervisor, Lt. Sutton, in West Palm Beach. The officers were instructed by Sutton that they were not to break the windows of the Dreske automobile and since petitioner's wife would not comply with the police demands, a tow truck should be called to haul the vehicle and its passengers to the Sheriff's Department at Stuart. A tow truck was in fact called and did arrive on the scene. Nevertheless, the three troopers proceeded for a period of approximately ten minutes to force the removal of the occupants of petitioner's vehicle by issuing further commands and orders, by the display of a crowbar in a menacing fashion, and by the display of a service revolver toward the petitioner and his wife.



Ultimately, all three officers ignored the instruction of their supervisor. A screw driver was secured from the operator of the tow truck, one of the windows in the petitioner's vehicle was forced open and chemical mace was sprayed into the occupied automobile. In the confusion that ensued as petitioner and his wife attempted to exit their vehicle, they were physically shoved about by the officers. Petitioner wound up with his face in the dirt, stomach to ground and hands cuffed behind his back. He and his wife were then transported in a Highway Patrol cruiser to the Martin County Jail at Stuart. Their automobile was towed away.

A criminal information was filed by the State's Attorney of the Nineteenth Judicial Circuit charging petitioner with resisting arrest with violence and a plea of not guilty was tendered to this charge.

Following deliberations, the jury returned a verdict finding petitioner guilty of a lesser offense of resisting arrest without violence. Petitioner was sentenced to a term of confinement of thirty (30) days in the county jail with a further proviso that he pay a fine of $1,000.00 or "in lieu of fine, serve an additional thirty days in jail".

Petitioner filed a petition for Writ of Habeas Corpus attacking the thirty (30) day sentence of imprisonment to commence on January 2, 1976 imposed by the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County on May 4, 1973.

Subsequently, petitioner's conviction was affirmed by the Fourth District Court of Appeals on October 4, 1974. *Dreske* v. *State*, 301 So. 2d 131. (App. 11-12). The Florida Supreme Court denied certiorari on May 8, 1975.

The United States District Court for the Southern District of Florida dismissed petitioner's petition for a Writ of Habeas Corpus in an unpublished order dated September 11, 1975. (App. 1-4). The United States Court of Appeals for the Fifth Circuit originally dismissed petitioner's appeal from the district court's order upon the allegation that petitioner was a fugitive from justice. 530 F.2d 973. Petition for rehearing was granted and the court of appeals vacated its original dismissal. Reaching the merits of petitioner's appeal, the court of appeals affirmed the denial of habeas corpus relief. 536 F.2d 105. (App. 7-10)



## REASONS FOR GRANTING THE WRIT

The court of appeals, in a one-sentence, matter-of-law statement, has ruled that there is no merit in petitioner's claim that his resistance to the demands and orders of the police officers was a constitutionally protected activity. 536 F.2d at 127. Petitioner feels that the court of appeals has decided a constitutional question of national importance, which heretofore has not been, but should be, settled by this Court. Moreover, the opinion of the court of appeals is in direct variance with the common law, and probably in conflict with applicable decisions of this Court and the Court of Appeals for the Third Circuit in *United States* v. *Ferrone*, 438 F.2d 381 (3rd Cir. 1971).

The right to resist unlawful and unreasonable demands and orders of the police is deeply rooted in the common law tradition. Indeed, this Court has on two occasions referred to the right to resist an unlawful arrest. *John Bad Elk* v. *United States*, 177 U.S. 529 (1900); *United States* v. *Dike*, 332 U.S. 581 (1948). Moreover, this Court has indicated that due process protects an individual from being punished for violating an arbitrary police order. *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965); *Wright* v. *Georgia*, 373 U.S. 284 (1963).

Nevertheless, the right to resist arbitrary and even unlawful police action has undergone marked erosion in recent years. Thus, in *United States ex rel. Horelick* v. *Criminal Court*, the District Court for the Southern District of New York, citing the fact that numerous state appellate court decisions and legislative enactments have abrogated the common law right to resist unlawful arrests, has ruled that barring unusual circumstances, there is no federal constitutional right to resist an unlawful arrest.

366 F.Supp. 1140 (S. D. N. Y. 1973). In *United States ex rel. Kilheffer* v. *Plowfield,* the District Court for the Eastern District of Pennsylvania reached the same result. 409 F.Supp. 677 (E.D. Pa. 1976).

However, it should be noted that in petitioner's case, the lawfulness of the underlying arrest is not in issue, i.e., the arrest for speeding was lawful. The precise question in this case, therefore, is not the right of an individual to resist an unlawful arrest, but rather the right of an individual to refuse to comply with an unreasonable command of a police officer, even though that command is made pursuant to a lawful arrest. In *Horelick,* the court distinguished between resistance to an unlawful arrest and refusal to obey an unlawful police order. The latter is not punishable under *Shuttlesworth* and *Wright.* 366 F.Supp. at 1151. The court of appeals in this proceeding failed to address itself to this precise issue.

Surely the mere fact of an arrest cannot require an individual to submit to any police directive, regardless of how unreasonable. To subject an individual to punishment for such resistance is surely a form of entrapment. The unjustified police conduct constitutes governmental provocation to the arrested person, whose defiance is a natural and predictable consequence. Hence, both the *Horelick* and *Kilheffer* decisions recognize that deliberate lawless official provocation would probably result in a constitutional right to resist. Once again, the court of appeals in this proceeding failed to address itself to the issue of entrapment.

Thus, there seems to be a recognition by the courts that the ordinary resisting arrest case should be treated differently from the case where:

> "the circumstances . . . would be such a provocation to a reasonable man that the seriousness of the offence



> of resistance ought to be mitigated as a result of such provocation."

*Kilheffer,* 409 F.Supp. at 682, citing *United States* v. *Ferrone,* 438 F.2d 381, 390 n. 19 (3rd Cir. 1971).

Justice Walden of the Florida Appellate Court, in a special concurring opinion affirming petitioner's conviction under the Florida statute, expressed "concern at the poor professional judgment employed by the three State Highway Patrol Troopers, their disregard of their supervisor's instructions, and their use of excessive and unnecessary force in arresting a private citizen for a minor traffic offense when he was unable to post a $26.00 bond." *Dreske* v. *State,* 301 S.2d 131 (Fla.App. 1974) (App. 11-12).

Faced with the unlawful and unreasonable demands of the police officers, petitioner responded with nonviolent conduct, solely intended to resist the provocation. Petitioner's right to resist should be reviewed by this Court.

## CONCLUSION

For the reasons set forth above, it is requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF FLORIDA

### ORDER OF DISMISSAL

George Roman Dreske has filed a Petition for Writ of Habeas Corpus attacking a thirty (30) day sentence of imprisonment to commence on January 2, 1976 imposed by the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County on May 4, 1973. Such sentence was imposed pursuant to a jury verdict of guilty to a lesser offense of resisting arrest without violence. Petitioner was originally charged with the offense of resisting arrest with violence.

Petitioner subsequently posted bond on Appeal. Petitioner's conviction was affirmed by the Fourth District Court of Appeals on October 4, 1974. See So. 2d 131. The Florida Supreme Court denied certiorari on May 8, 1975. On December 2, 1974 Petitioner moved for reduction of sentence and on June 27, 1975, the trial court ruled that the execution of Petitioner's sentence would be deferred until January 2, 1976. The fine portion of the sentence was to be paid before July 14, 1975. On July 3, 1975, Petitioner moved the trial court be stay execution of sentence until Petitioner had exhausted his Federal remedies. On August 5, 1975 the trial court denied such motion. On September 2, 1975 this Court denied Petitioner's motion seeking bail during the pendency of this Federal Habeas Corpus proceeding.

The Petitioner is in custody for the purpose of Federal Habeas Corpus review. *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973).

As grounds for relief Petitioner alleges that:

1. Florida Statute 843.02 is unconstitutional on its face.
2. Florida Statute 843.02 is unconstitutional in its application due to the alleged insufficiency of evidence presented at trial.
3. The prosecutor's closing argument violated Petitioner's Federal Constitutional rights.
4. The information was amended the day before trial.

Petitioner has exhausted his available state remedies.

Florida Statute 843.02 provides in part that:

> "Whoever shall obstruct any such officer, [Sheriff, etc.] . . ., in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree."

This Court finds that such statute sufficiently specifies the conduct which is prescribed. Such statute gives "a person of ordinary intelligence fair notice" that his contemplated conduct is prohibited. Accordingly, this Court concludes that Florida Statute 843.02 is not impermissibly vague. See *United States* v. *Harriss,* 347 U.S. 612 (1954); *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972); *Colton* v. *Kentucky,* 407 U.S. 104 (1972).

Additionally, it is clear that such statute does not prohibit constitutionally protected conduct. *Grayned, Supra.*

At present, the evidence clearly established that Petitioner (an out of state motorist) was stopped for speeding on the Florida Turnpike in Martin County. Petitioner failed to obey an order of State Trooper Richard Arthur Weaver to accompany Weaver to the Martin County



Sheriff's Department to post bond. (This is a normal procedure as to out of state motorists). R 238. Petitioner had already been placed under arrest for speeding and failure to produce a valid driver's license. Petitioner locked himself in his vehicle, thereby obstructing the State Troopers in the performance of their lawful duties. The Troopers eventually sprayed "mace" into Petitioner's vehicle to get Petitioner and Petitioner's wife out of the vehicle. Allegedly, Petitioner "Flung" his door open and "swung" at the Troopers. R 251-252

Accordingly, this Court finds that Petitioner's second contention is unmeritous. An examination of the trial transcript reveals that the evidence was clearly sufficient to sustain conviction of the offense charges. It is well established that Federal Habeas Corpus proceedings are not available to review the sufficiency of evidence presented in state trials unless the evidence is so totally lacking that to uphold the verdict would constitute a denial of the constitutional right to due process of law. *Young* v. *Alabama,* 443 F. 2d 854 (5th Cir., 1971); *Pleas* v. *Wainwright,* 441 F. 2d 56 (5th Cir., 1971).

Petitioner's third contention does not rise to constitutional proportions. At no point did Petitioner object to any allegedly prejudicial prosecutorial comment during closing argument. Nonetheless, this Court concludes that the prosecutor's closing argument did not vitiate the basic fairness of the trial. *Bryant* v. *Caldwell,* 484 F. 2d 65 (5th Cir., 1973); *Higgins* v. *Wainwright,* 424 F. 2d 177 (5th Cir., 1970). Prejudicial remarks fall within the category of "trial irregularities" and are not generally reviewable in Federal Habeas Corpus proceedings.

Finally, Petitioner contends that the information was improperly amended on April 10, 1973 (one day prior to trial). However, Petitioner was adequately apprised of the offense for which he was charged and was not prejudiced in the preparation of his defense. At present, the deposition of Trooper R. J. Carroll dated March 16, 1973 clearly reveals that Petitioner was not prejudiced or surprised by any matters contained in the amended information. See *United States* v. *Blanchard,* 495 F. 2d 1329 (1st Cir., 1974); See e.g., *United States* v. *Miller,* 491 F. 2d 638 (5th Cir., 1974); *United States* v. *Fischetti,* 459 F. 2d 31 (5th Cir., 1971).

For these reasons it is hereby

ORDERED AND ADJUDGED that this Petition for Writ of Habeas Corpus be DISMISSED.

DONE AND ORDERED at Miami, Florida, this 11th day of September, 1975.



UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1975

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No. 75-3942

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D. C. Docket No. 75-1433-CIV-CA

GEORGE ROMAN DRESKE,
Petitioner-Appellant,

versus

JAMES D. HOLT, Sheriff, Martin County, Florida,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on petitioner-appellant's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered in this Court on April 13, 1976 is vacated; and that the judgment of the said District Court appealed from is hereby affirmed.

George Roman DRESKE,
Petitioner-Appellant,

v.

James D. HOLT, Sheriff, Martin County, Florida,
Respondent-Appellee.

No. 75-3942

United States Court of Appeals,
Fifth Circuit.

Aug. 2, 1976.

An appeal from a denial of habeas corpus relief in the United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., was originally dismissed, 530 F.2d 973. On petition for rehearing, the Court of Appeals held that the Florida statute under which defendant was convicted of resisting arrest without violence provided a person of ordinary intelligence with fair notice of prohibited conduct, and was not facially unconstitutional. Resistance to arrest was not constitutionally protected. Evidence was ample to establish petitioner's resistance to arrest and refusal to accompany officers in performance of their legal duties, and thus established violation of the statute. There is no sufficiency of evidence problem rising to constitutional proportions for habeas corpus relief.

Affirmed.

1. *Obstructing Justice*—2

Florida statute under which defendant was convicted of resisting arrest without violence provided person of ordinary intelligence with fair notice of prohibited conduct and was not facially unconstitutional; resistance to arrest



was not constitutionally protected activity. West's F.S.A. § 843.02.

2. *Obstructing Justice*—16

Evidence was ample to establish petitioner's resistance to arrest and refusal to accompany officers in performance of their legal duties, and thus established violation of Florida statute. West's F.S.A. § 843.02.

3. *Habeas Corpus*—45.2(4)

There is no sufficiency of evidence problem rising to constitutional proportions for habeas corpus relief.

4. *Criminal Law*—1037.1(1)

No constitutional error was found in closing remarks of prosecutor, to which defendant had made no objection.

5. *Indictment and Information*—161(6)

Petitioner was not prejudiced or surprised by any matters contained in amended information, which added name of second officer involved with arrest, to which petitioner had made resistance, and in absence of any attempt by petitioner to obtain continuance, amendment one day prior to trial did not deny him fair trial. West's F.S.A. § 843.02.

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Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

In an unpublished order we originally dismissed this appeal from a denial of habeas corpus relief upon the allegation that petitioner was a fugitive from justice. *Dreske*

v. *Holt,* 530 F.2d 973 (5th Cir. 1976). It now appears that petitioner was not a fugitive, at least in the traditional sense. The petition for rehearing therefore is granted and the original order of dismissal is vacated. Reaching the merits of petitioner's appeal, we affirm the denial of habeas corpus relief.

Part of the confusion raised by this case, in regard to Dreske being a fugitive from justice, is petitioner's failure to comply with the district court's order for posting a bail bond in the sum of $5,000. The bond was set as a condition of the stay pending appeal of the district court's denial of relief, so that Dreske could remain free while the appeal was pending before this Court. Nothing in the record indicates the reason for noncompliance with the district court's bond requirements. Nevertheless, petitioner is currently free on a $5,000 state court supersedeas bond. Because of health reasons, Dreske's sentence had been deferred by the state court until July 1, 1976. Instead of remanding this case to the district court for determining why the order was not complied with, judicial economy, and the best interests of all parties, will be better served by this Court's disposition of the appeal on the merits.

Dreske, an out-of-state motorist, was stopped on the Florida Turnpike for speeding and driving without a valid license. He refused to accompany officers to the sheriff's department to post bond, a normal procedure for out-of-state motorists, and subsequently locked himself inside his car. A jury convicted Dreske of resisting arrest without violence. Fla.Stat. § 843.02. He was sentenced to 30 days in jail and fined $1,000. This conviction was affirmed on appeal. *Dreske* v. *State,* 301 So.2d 131 (4th D.C.A.Fla. 1974), *cert. denied,* 314 So.2d 582 (Fla. 1975).



Dreske levels several constitutional challenges to Florida Statute § 843.02 which he was convicted of violating. The statute provides:

> Whoever shall obstruct or oppose any such officer, beverage enforcement agent, any member of the Florida parole and probation commission or any administrative aide or supervisor employed by said commission or any personnel or representative of the department of law enforcement or legal authorized person, in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

Dreske also argues denial of due process by the prosecutor's prejudicial closing arguments at the state trial, and by the state's amending the information one day prior to trial.

[1-3] We agree with the district court that Fla.Stat. § 843.02 is not facially unconstitutional. Under the principles enunciated by the Supreme Court, the statute provides a person of ordinary intelligence with fair notice of the prohibited conduct. *See, e. g., Grayned* v. *City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Colten* v. *Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972); *United States* v. *Harriss,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). There is no merit in petitioner's claim that his resisting arrest was constitutionally protected activity. *See Colten* v. *Kentucky, supra.* Neither is there any substance to the argument that the statute is unconstitutional as applied to the facts of petitioner's case. The record contains ample evidence of petitioner's resisting arrest and his refusal to accompany the officers in the performance of their legal duties. There is

no sufficiency of the evidence problem rising to constitutional proportions for habeas corpus relief. *Young* v. *Alabama,* 443 F.2d 854, 855 (5th Cir. 1971), *cert. denied,* 405 U.S. 976, 92 S.Ct. 1202, 31 L.Ed.2d 251 (1972); *Pleas* v. *Wainwright,* 441 F.2d 56, 57 (5th Cir. 1971).

[4] Petitioner argues constitutional error in the prosecutor's closing remarks. No objection was made to these comments. We find no error of constitutional proportions. *See Higgins* v. *Wainwright,* 424 F.2d 177, 178 (5th Cir.), *cert. denied,* 400 U.S. 905, 91 S.Ct. 145, 27 L.Ed.2d 142 (1970).

[5] Petitioner's final argument is that amending the information one day prior to trial denied him a fair trial. The amendment added the name of a second officer involved with the arrest. Dreske made no attempt for a continuance. We affirm the district court's finding that petitioner was not prejudiced or surprised by any matters contained in the amended information. *See United States* v. *Blanchard,* 495 F.2d 1329, 1332-1333 (1st Cir. 1974); *cf. United States* v. *Miller,* 491 F.2d 638, 644 (5th Cir.), *cert. denied,* 419 U.S. 970, 95 S.Ct. 236, 42 L.Ed.2d 186 (1974).

AFFIRMED.



George Roman DRESKE, Appellant,

v.

STATE of Florida, Appellee.

No. 73-557.

District Court of Appeal of Florida,
Fourth District.

Oct. 4, 1974.

Rehearing Denied Oct. 30, 1974.

Appeal from Circuit Court, Martin County; C. Pfeiffer Trowbridge, Judge.

Michael F. Cycmanick and James M. Russ, Law Offices of James M. Russ, Orlando, and Jerris Leonard, Leonard & Cohen, Washington, D.C., for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, and C. Marie Bernard, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

OWEN, C. J., and DOWNEY, J., concur.

WALDEN, J., concurs specially.

WALDEN, Judge (specially concurring):

Having considered the several points, I concur that, according to the theme and limits of our appellate authority, the judgment and sentence must be affirmed. However, I don't feel the issues should be allowed to slip into oblivion without taking note and generally expressing concern at the

poor professional judgment employed by the three State Highway Patrol troopers, their disregard of their supervisor's instructions, and their use of excessive and unnecessary force in arresting a private citizen for a minor traffic offense when he was unable to post a $26.00 bond. While appellant did refuse to cooperate and as a consequence received the maximum allowable sentence, which we here affirm, he was fifty-five years of age, unarmed, passive and offering no threat to the safety of the troopers. Regardless, there were threats with a crowbar, a loaded service revolver, use of mace, and manhandling, all of which could have been avoided had the troopers simply followed the explicit instructions of their supervisor, Lieutenant Sutton.

For these reasons I do expressly concur.

Supreme Court, U. S.
FILED
DEC 6 1976
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

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CASE NO. 76-600

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GEORGE ROMAN DRESKE,

Petitioner,

v.

JAMES D. HOLT,

Respondent.

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# BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

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IN THE SUPREME COURT OF THE UNITED STATES

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CASE NO. 76-600

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GEORGE ROMAN DRESKE,

Petitioner,

v.

JAMES D. HOLT,

Respondent.

---

BRIEF IN OPPOSITION TO A PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

PRELIMINARY STATEMENT

Petitioner was the Petitioner and Appellant in the respective lower courts, the United States District Court for the Southern District of Florida and the United States Fifth Circuit Court of Appeals, Respondent was the Respondent and Appellee.

Parties will be referred to in his brief as they appear before this Court.

## OPINIONS BELOW

Respondent accepts Petitioner's statement of the opinions below, but notes additionally that the opinion of the Fourth District Court of Appeal of the State of Florida on Petitioner's direct appeal may be found at 301 So.2d 131 (4DCA Fla. 1974). Respondent further notes that Petitioner sought review by certiorari in the Supreme Court of the State of Florida. His petition for a writ of certiorari was denied at 314 So.2d 582 (Fla. 1975).

## JURISDICTION

Respondent agrees with Petitioner's contention that this Court is authorized under 28 U.S.C. 1254(1) to review by certiorari decisions of federal appellate



courts. However, Respondent offers several reasons why this Court should not consider this cause on its merits. These reasons are set forth in the Argument portion of this brief. Inasmuch as they may also be viewed as jurisdictional in nature, Respondent hereby incorporates these reasons as a part of this jurisdictional statement.

## QUESTION PRESENTED

A. Whether the issue Petitioner seeks to raise is properly before this Court?

B. Whether Petitioner's locking himself in his car and refusing to submit to arrest is constitutionally protected conduct? (Restated)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent concedes that Petitioner has correctly stated the language of the

constitutional and statutory provisions he cites.

## STATEMENT OF THE CASE

Respondent accepts much of Petitioner's Statement of the Case, but notes the following exceptions and additions.

(1) Petitioner was stopped for exceeding the speed limit in Martin County, Florida. He was asked for his driver's license and responded that he did not have it with him. He was told at that time that if he posted an appearance bond in cash or traveler's checks for the offenses of driving without a license and exceeding the speed limit,there would be no need to proceed to the sheriff's office. Petitioner told the trooper that he did not have the money. He was then told that he would have to proceed to the Martin County Sheriff's Office.



(2) Petitioner told the trooper that he would not go to the Martin County Sheriff's Office, inasmuch as he did not want to go back in the direction from which he came. The trooper then informed him that he was under arrest and would be required to follow the trooper to the Martin County Sheriff's Office.

(3) While the trooper was writing citations, Petitioner ran to his car and started the motor. The trooper told him once again that he would have to proceed to the Martin County Sheriff's Office, noting additionally that Petitioner's wife would have to drive since Petitioner did not have a driver's license with him. The trooper also told Petitioner to turn off the motor and Petitioner did so. In light of Petitioner's unusual conduct, the trooper radioed for a backup, in accordance with the

required police procedure.

(4) As the trooper continued to write the citations, Petitioner told him that he would proceed in the direction he was traveling and get off the highway at the Ft. Pierce exit and go to the Ft. Pierce County Sheriff's Office. The trooper explained to him that the matter would have to be handled in the county in which the offense occurred, Martin County. Petitioner did not express any fear of turning around on the highway, nor did he offer to drive to the next exit in order to reverse direction without crossing the median strip. Rather, he merely stated that he would not go back in the direction from which he came but that he would continue in the same direction to the Ft. Pierce County Sheriff's Office.

(5) Upon being told that the procedure



he sought to follow was not acceptable, Petitioner stated that he would not go anywhere and locked himself in his car with his wife.

(6) A second trooper then arrived on the scene. He conferred with the first trooper and then he also informed Petitioner that he was under arrest. Petitioner smiled in response. When Petitioner was then asked to roll down the window, he shook his head in a negative fashion.

(7) Approximately eight minutes after the second trooper arrived on the scene, a third trooper arrived. It was only upon the arrival of the third trooper, approximately 23 minutes after the initial stop and Petitioner's initial refusal to accompany the trooper, that the troopers positioned their cars in a manner which prevented Petitioner's car from being driven.

(8) After the cars were so positioned, Petitioner was once again informed that he was under arrest and told that if he did not get out of the car, the troopers would employ lawful means of getting him out. Once again, Petitioner's only response was a smile.

(9) It was only after the above circumstances that the troopers sought to force Petitioner from his car. This action was undertaken in disregard of the orders of the troopers' supervisor and apparently consisted of prying open a vent window and spraying mace into the car. Petitioner emerged from the car and a physical confrontation ensued. There is conflicting testimony as to whether this confrontation was initiated by Petitioner or by the troopers.



## ARGUMENT

Petitioner seeks review by certiorari of a decision of United States Court of Appeals for the Fifth Circuit affirming an order of the United States District Court for the Southern District of Florida which dismissed Petitioner's petition for writ of habeas corpus. Respondent asserts that this court should not consider the issue Petitioner seeks to raise.

Petitioner asks this Court to adopt his contention that his conduct was "intended to resist the unlawful and unreasonable demands of a police officer (Petition for a Writ of Certiorari, p. 2)," and was therefore constitutionally protected. However, this contention was not presented to any State court, nor was it presented in the petition for writ of habeas corpus. Respondent submits that either of these

factors is a sufficient basis for the conclusion that this Court should not consider the issue.

It is well-settled that in order to obtain federal habeas corpus review, a petitioner must first exhaust all state remedies. Fay v. Noia, 372 U.S. 391(1963); Picard v. Connor, 404 U.S. 270(1971). Petitioner appealed his judgment and sentence to the Florida Fourth District Court of Appeal. He raised six issues on this direct appeal. Petitioner's "Statement of Points Involved on Appeal" set forth these points and is reproduced in the Appendix to this brief. These points include the sufficiency of the evidence and the jury instructions, the procedure followed in amending the information filed against Petitioner, the prosecution's closing argument, the severity of the sen-



tence, and the constitutionality of the statute under which Petitioner was charged with resisting arrest. The issue Petitioner seeks to raise before this Court was not presented.

It was not presented in the petition for writ of habeas corpus either.

As Judge Atkins of the district court noted in the order dismissing the original petition:

> "As grounds for relief Petitioner alleges that:
> 1. Florida Statute §843.02 is unconstitutional on its face.
> 2. Florida Statute §843.02 is unconstitutional in its application due to the alleged insufficiency of evidence presented at trial.
> 3. The prosecutor's closing argument violated Petitioner's Federal Constitutional rights.
> 4. The information was amended the day before trial."
>
> Petitioner's Appendix to Petition for a Writ of Certiorari, p. 2.

Thus the first time Petitioner raised the argument he now seeks to advance was on appeal of the dismissal of his petition for a writ of habeas corpus.

Respondent contends that these circumstances bar consideration of the issue by this Court. Petitioner's failure to exhaust state remedies precludes habeas corpus relief. Had the issue that is now being raised been asserted in the original petition, its inclusion would have resulted in the petition's dismissal without consideration of the merits. Burroughs v. Wainwright, 454 F.2d 1165 (5th Cir. 1972). To consider the issue at this point, in a proceeding arising from the dismissal of the original petition, would be contrary to the requirements for consideration of an issue by a federal court.

Further, Petitioner's failure to



present this issue to the district court should preclude its consideration here. Any review of the decision of the district court must be limited to those matters on which it ruled. Young v. Wainwright, 326 F.2d 255 (5th Cir. 1964); Anderson v. Texas, 507 F.2d 105 (5th Cir. 1975). Since the district court did not rule on the assertions Petitioner now sets forth, it cannot be said that the district court erred even if Petitioner's arguments are considered to be valid.

It can be concluded that Petitioner's attempt to bring this issue before this Court at this time is an attempt to circumvent the requirements that he exhaust state remedies and that the district court pass on his contentions. Accordingly, this Court should not consider the merits of Petitioner's claim.

However, even if Petitioner had exhausted state remedies and had presented this issue to the district court, a question would still arise as to whether this Court should reach the merits of Petitioner's argument.

In Stone v. Powell, ___ U.S. ___, 49 L.Ed.2d 1067 (1976), this Court held that where a State provides a defendant with an opportunity for full and fair litigation of a claimed Fourth Amendment violation, the defendant is not entitled to federal habeas corpus consideration of the same issue.

Underlying this conclusion is the rationale that

> ". . . Fourth Amendment violations are different in kind from denials of Fifth and Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of



> of the fact-finding process or challenge evidence as inherently unreliable;. . . (Kaufman v. United States, 394 U.S. 217 (1969)) at 224.'" Stone, supra at 1079.

While it is true that the present case does not deal with an allegation of a Fourth Amendment violation, it is also true that it does not deal with an allegation that the integrity of the fact-finding process has been impugned nor with an allegation of inherently unreliable evidence. To the contrary, there seems to be little dispute over the facts. Petitioner merely seeks to have this Court adopt his interpretation of his actions. Accordingly, Respondent submits that the rationale set forth in Stone, supra, should be extended to the present case and that Petitioner's claim, which has reached this Court through proceedings arising from a petition for writ of habeas corpus, should not be

considered due to its being an improper subject for federal collateral review.

Respondent additionally questions whether Petitioner's appeal in the Fifth Circuit should have even been considered on its merits.

As noted in the court's opinion, Petitioner failed to comply with the district court's order to post a bail bond in the amount of $5,000.00, as a condition of the stay of Petitioner's sentence pending appeal of the district court's denial of relief.

After Petitioner moved the district court to set bond but before it did so, the State courts deferred Petitioner's sentence due to health reasons, contingent on the posting of a $5,000.00 bond. Petitioner did post this bond.

Respondent submits that the staying of



Petitioner's sentence for medical reasons should be concluded to have no relation to the posting of bond required by the district court. In order to maintain an appeal in a federal court, the appellant must be within the control of the court, "either actually, by being in custody, or constructively, by being out on bail." Bohanan v. Nebraska, 125 U.S. 692 (1887). Petitioner's failure to post bond removed him from control of the federal court. The fact that he was under the constructive control of the State court does not change that fact; nor does any collateral medical reasons. Accordingly, Respondent submits that the court of appeals erred in considering Petitioner's arguments on their merits and that any consideration of the merits at this time would be to compound this error.

Even if Petitioner's argument is considered, however, it should be concluded to be without merit. Petitioner seeks to frame the issue in terms of resisting an unreasonable command of a police officer, but fails to allege any unreasonable command. It can certainly not be considered unreasonable for the officer to have required Petitioner to accompany him to the sheriff's office of the county in which the offense occurred, when Petitioner exceeded the speed limit without a driver's license and did not have the money to post bond. Nor can it be considered unreasonable to have asked Petitioner to roll down the car window or to get out of the car after he had been placed under arrest.

Petitioner notes that his wife refused to obey the officers' order that she drive the car across the median strip in order



to return to the sheriff's office. In considering that fact, it should be first noted that such a request is entirely reasonable when police officers are present to supervise the procedure. Further, it should be remembered that the refusal to obey this direction occurred after Petitioner had locked himself in the car and refused to roll down his window or to get out of the car. Thus, even if the officers' order is considered unreasonable, this fact is wholly immaterial as regards Petitioner's conviction of resisting arrest without violence. His actions prior to the order certainly constituted such resistance. The final point to be considered in analyzing the actions taken in response to this order is the fact that the person who refused to act according to the officers' instruction that the car be driven over

the median strip was not Petitioner, but Petitioner's wife. In fact, the officer made it clear that Petitioner was not to drive due to the fact that he did not have a license. Also, there is nothing to indicate that Petitioner had any misgivings as to the procedure, but just that he did not want to be inconvenienced by returning in the direction from which he came. Thus, even if the order is considered unreasonable and the failure to obey it is considered proper, the only conclusion that could be drawn would be that had Petitioner's wife been under arrest, she would not have been guilty of resisting arrest.

It is true that the action taken by the troopers in removing Petitioner from his car contrary to instructions from their supervisor was not the ideal procedure to



have followed. However, inasmuch as Petitioner's violation of the resisting arrest statute had already occurred when the troopers removed him from his car, the troopers' actions have no bearing on consideration of whether Petitioner's resistance was acceptable conduct. Petitioner's inclusion of these actions in his argument is merely an attempt to cloud the issue; the question remains whether Petitioner's conduct in locking himself in his car and refusing to come out or roll down his window was constitutionally protected resistance of an unreasonable order.

## CONCLUSION

Respondent submits that based on the foregoing argument and authorities, this Court should conclude that the issue

Petitioner seeks to present is not a proper subject for consideration by this Court. Respondent further submits that even if the issue Petitioner seeks to raise is considered, the conclusion should be reached that Petitioner's contentions are without merit. Respondent therefore requests that this Court deny the Petition for a Writ of Certiorari and affirm the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent in Opposition has been furnished this _____ day of December, 1976, to Honorable John P. Savage, 3121 West Wisconsin Avenue, Milwaukee, Wisconsin 53208 and Honorable Michael O. Bohren and Honorable Moses J. Zimmermann, 7635 W. Oklahoma Avenue, Milwaukee, Wisconsin 53219.

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# APPENDIX

## STATEMENT OF POINTS INVOLVED ON APPEAL

I

WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION AND JUDGMENT IMPOSED

II

WHETHER THE CLOSING COMMENTS OF THE STATE PROSECUTOR WERE OF SUCH INFLAMMATORY AND PREJUDICIAL NATURE AS TO DEPRIVE THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

III

WHETHER THE TRIAL COURT ERRED IN ALLOWING SUBSTANTIAL AMENDMENTS TO THE INFORMATION FILED AGAINST MR. DRESKE BY GRANTING LEAVE FOR THE STATE TO AMEND ON THE DAY PRIOR TO TRIAL WITHOUT PROVIDING NOTICE, AN OPPORTUNITY TO PLEAD ANEW, FACE ARRAIGNMENT AND DEFEND AGAINST THE SUBSTANTIALLY ALTERED CHARGES

IV

WHETHER THE SENTENCE IMPOSED AGAINST THE DEFENDANT WAS SO PATENTLY HARSH AND EXCESSIVE AS TO REQUIRE THAT IT BE VACATED AND SET ASIDE

V

WHETHER FLORIDA STATUTE §843.02 (1971) IS UNCONSTITUTIONAL ON ITS FACE BECAUSE THE VAGUENESS AND OVERBREADTH OF ITS TERMS VIOLATE DUE PROCESS GUARANTEES SECURED BY ARTICLE I, SECTION 9 OF THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

VI

WHETHER THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTIONS TO THE JURY BY OMITTING OR FAILING TO GIVE A CHARGE ON ATTEMPT